

ORIGINAL



0000113448

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

COMMISSIONERS:

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

2010 JUN 22 A 11:47

AZ CORP COMMISSION
DOCKET CONTROL

In the matter of:

Docket No. S-20600A-08-0340

MARK W. BOSWORTH and LISA A.
BOSWORTH, husband and wife;

STEPHEN G. VAN CAMPEN and DIANE V.
VAN CAMPEN, husband and wife;

MICHAEL J. SARGENT and PEGGY L.
SARGENT, husband and wife;

ROBERT BORNHOLDT and JANE DOE
BORNHOLDT, husband and wife;

MARK BOSWORTH & ASSOCIATES, LLC, an
Arizona limited liability company;

3 GRINGOS MEXICAN INVESTMENTS, LLC, an
Arizona limited liability company;

Respondents.

RESPONDENTS
MICHAEL J. SARGENT
AND PEGGY L. SARGENT'S

REPLY IN SUPPORT OF
MOTION TO QUASH
ADMINISTRATIVE SUBPOENA
ISSUED TO MICHAEL J. SARGENT

Arizona Corporation Commission

DOCKETED

JUN 22 2010

DOCKETED BY

Respondents Michael J. Sargent ("Mr. Sargent") and Peggy L. Sargent (collectively, the "Sargents") respectfully reply in support of their motion to quash the Administrative Subpoena issued to Michael J. Sargent on June 9, 2010.

The subpoena should be quashed because: (1) the subpoena was issued far too late, and prejudices the ability of Mr. Sargent to prepare for testimony; (2) the Division failed to provide the required witness fee; and (3) the required subpoena application is insufficient. Notably, the Response filed by the Securities Division does not assert that: (1) it advised Respondent's counsel of the date it intended to call Mr. Sargent as a witness, prior to June 9, 2010; (2) it provided the witness fee; or (3) its subpoena application is sufficient under A.A.C. R14-3-109(O).

I. This belated subpoena prejudices Mr. Sargent's defense.

The June 9, 2010 subpoena is "unreasonable or oppressive" (A.A.C. R14-3-109(O))

1 because it was issued after the hearing began on Wednesday, June 9, 2010. The motion cites *Sam*
2 *v. State*, 33 Ariz. 383, 412-413, 265 P. 609, 619 (1928) and *Parkinson v. Farmers Insurance Co.*,
3 122 Ariz. 343, 344, 596 P.2d 1039, 1040 (Ct. App. 1979), to demonstrate that subpoenas issued
4 after the start of trial are unreasonable and should be quashed, absent good cause shown by the
5 party issuing the subpoena. Given the extreme lateness of the subpoena, it is presumptively
6 invalid under *Sam* and *Parkinson*, and the Division bears the burden of proving good cause. The
7 Division attempts to distinguish those cases as involving third-party subpoenas¹; but the cases do
8 not make that distinction. No special rule exempts witnesses who are parties from the protections
9 afforded to every witness to be spared unreasonable or oppressive subpoenas.

10 The Division complains that the motion does not explain how the subpoena's extreme
11 lateness is "unreasonable or oppressive." But extremely late subpoenas are presumed
12 unreasonable; it is up to the Division to show good cause. Even if that were not the case, a late
13 subpoena to a witness who is a party is unreasonable because it disrupts the defense and forces a
14 rushed attempt to prepare the witness. The Division is putting on a lengthy and complex case,
15 calling many witnesses, most of whom have had little or no contact with Mr. Sargent. Indeed,
16 each investor witness to testify so far has testified that Mr. Sargent did not sell them anything.
17 Thus, the defense has been forced to prepare for numerous irrelevant, or at best, tangentially
18 relevant, witnesses. Adding the burden of preparing for Mr. Sargent's testimony, on top of these
19 existing burdens, is unreasonable. The Division is well aware that Mr. Sargent has very limited
20 resources for funding his defense; this additional burden threatens to "bleed the defense dry."

21 The Division states that "Sargent has undoubtedly been assisting his attorneys in
22 preparation for the administrative hearing."² But assisting counsel in preparing for other
23 witnesses is very different from preparing to personally testify as a witness. Such preparation
24 would require, at a minimum: (1) Mr. Sargent closely reviewing the Division's voluminous
25 exhibits, in case the Division asks questions about any of them; (2) discussions with counsel on

26
27 ¹ Division Response dated June 21, 2010 at page 2, footnote 2.

² Division Response at 4:3-4.

1 the techniques of testifying as a witness; (3) practice sessions; and (4) most importantly,
2 discussions with counsel, and criminal counsel, regarding whether to assert the privilege against
3 self-incrimination under the United States and Arizona Constitutions, including related research,
4 given the pending Arizona Attorney General investigation. None of these activities are involved
5 in simply assisting counsel in preparation for the cross-examination of other witnesses. If the
6 subpoena is not quashed, Mr. Sargent and his defense team must take all of these steps, at the last
7 minute, with little time to prepare.

8 The Division points to its February 23, 2009 subpoena as providing notice to Mr. Sargent.
9 But, as the Division acknowledges, the February subpoena was quashed.³ Mr. Sargent had no
10 obligation to comply with an invalid subpoena. Moreover, the February subpoena commanded
11 Mr. Sargent to testify on March 15, 2010.⁴ It did not contain the usual language about “or any
12 subsequent days the hearing is continued...” After March 15th passed without his being called,
13 Mr. Sargent was not on notice that he was to be called at some unspecified date in June 2010. The
14 Division never provided any specific date in June, until it served the subpoena.

15 If the February subpoena had been valid, typically, one would expect the Division to
16 contact Mr. Sargent’s counsel to indicate the date they expected to call Mr. Sargent. That would
17 alert defense counsel: (1) to the existence of the February subpoena; (2) that the Division, in fact,
18 intended to call Mr. Sargent; (3) that the validity of the February subpoena would be at issue; and
19 (4) that Mr. Sargent would need to be prepped to testify, if the subpoena was not quashed (as in
20 fact, it was). The Division did not provide such notice. Indeed, on Friday, June 4, 2010, the
21 Division telephonically provided Mr. Sargent’s counsel with the order of witnesses the Division
22 intended to call – and Mr. Sargent was not included.

23 A witness cannot be prepared to testify in a significant matter “on the drop of a hat.” Here,
24 Mr. Sargent’s ability to adequately prepare as a witness is compromised by the extreme tardiness
25 of the June subpoena. The Division isn’t asking Mr. Sargent to testify about a traffic accident or

26 _____
27 ³ Division Response at 3:10.

⁴ Division Response at Exhibit A, page 1.

1 some other simple matter. In its opening statement, the Division asked for more than \$4 million
2 in restitution. This case involves a large number of documents including the Division's
3 voluminous exhibits. Moreover, based on the witnesses called so far, the Division apparently
4 believes that Mr. Sargent is responsible for every single investor – even those he never met, or
5 those he only met many months after they invested. Thus, Mr. Sargent would require significant
6 time to prepare, if he is forced to testify and answer the Division's questions.

7 The Division must also contend with the fact that its subpoena was issued more than a
8 month after the Division objected to Mr. Bosworth's subpoenas as being untimely. The ALJ
9 agreed, and quashed Bosworth's requested subpoenas as untimely. The Division argues that
10 Bosworth's subpoenas are different, because they are "discovery requests pursuant to A.R.S. §
11 41-1062."⁵ But Bosworth's subpoenas were requested under A.A.C. R14-3-109(O), the same rule
12 that the Division invokes to issue its June subpoena. The Division recognized this when it filed
13 its objections and motion to quash Bosworth's subpoenas – the Division specifically referred to
14 the requirements of A.A.C. R14-3-109(O) as governing the Bosworth subpoenas.⁶ There is
15 simply no explanation as to how Bosworth's subpoenas could be too late, and the Division's
16 month-later subpoena could be timely.

17 The same goes for the Sargents' May 3, 2010 Requests for Admissions and Interrogatories
18 to the Division. The Sargents' discovery requests were expressly issued under the Commission's
19 procedural rules, and the Rules of Civil Procedure (as incorporated in the Commission's rules).
20 These requests were quashed as untimely. But if the Sargents' May 3rd discovery was untimely,
21 how can the Division's June 9th subpoena be timely?

22 In sum, the Division's June 9th subpoena is too late, and is presumed unreasonable. Even
23 without a presumption, the subpoena is unreasonable because of the additional burden it places on
24

25 ⁵ Division Response at 4:10-11.

26 ⁶ Division "Objection to and Motion to Quash Respondent Bosworth's Request for Issuance of Administrative
27 Subpoenas for Documents" at 4:22-25.

1 the defense at this late date, and because of the extensive preparation Mr. Sargent would need to
2 testify.

3 **II. The statutory witness fees were not provided.**

4 The Sargents' motion to quash explained that subpoenas must be served with required
5 witness fees, and that the failure to do so renders the subpoena invalid. The Division's response
6 does not dispute these points; nor does it assert that the Division paid the witness fees. Instead,
7 the Division argues that it is not required to pay witness fees under Rule 45(b)(2) of the Arizona
8 Rules of Civil Procedure. The Division's argument is surprising, given that it has vociferously
9 argued that the rules of civil procedure don't apply in Commission proceedings.⁷ The Division
10 cannot have it both ways. Either the Division must state on the record, once and for all, that it is
11 bound by the Rules of Civil Procedure and will comply with them, or it should not be allowed to
12 invoke them here.

13 **III. The subpoena application is insufficient.**

14 The Sargents' motion to quash quoted the Division's May 10th statement of the
15 requirements for subpoena applications:

16 Rule 14-3-109(O) provides that ...[a] request for issuance of the
17 Subpoenas must be supported by an "application" submitted to the
18 administrative law judge and Rule 14-3-106(F) states that the application
"shall contain the facts upon which the application is based, with such
exhibits as may be required or deemed appropriate by the applicant."⁸

19 The motion goes on to argue that the Division's one-sentence subpoena application does not come
20 close to meeting this standard. The Division does not even attempt to argue that its perfunctory
21 subpoena application meets this standard. Instead, it argues that subpoena applications are not
22 "formal documents" as defined by Commission rules, and thus do not need to be docketed. Even
23

24
25 ⁷ See e.g. Division "Objection to and Motion to Quash Respondent Bosworth's Request for Issuance of Administrative
26 Subpoenas for Documents" (May 10, 2010) at 2; Division "Objection to and Motion to Quash Respondents Michael J.
Sargent and Peggy L. Sargent's First Request for Admissions and Non-Uniform Interrogatories" (May 18, 2010) at 2,
6.

27 ⁸ Division "Objection to and Motion to Quash Respondent Bosworth's Request for Issuance of Administrative
Subpoenas for Documents" at 4:22-25.

1 if the Division is correct, it still has not met the subpoena application standard, as expressed in its
2 own May 10th filing. The Division's application consists of the following sentence: "The
3 Securities Division of the Arizona Corporation Commission requests the issuance of a subpoena
4 to MICHAEL J. SARGENT in connection with the Administrative Hearing in the above-
5 captioned action." The application does not contain any facts; certainly not the "facts upon which
6 the application is based," as the Division itself says is required.

7 The Division's response does not – and cannot – argue that it meets subpoena application
8 standard in the Commission's procedural rules. In a footnote, the Division refers investigatory
9 subpoenas and states that the Commission's procedural rules do not apply to investigatory
10 subpoenas.⁹ But the June 9th subpoena is not an investigative subpoena. Indeed, the subpoena
11 itself refers to the procedural rule for subpoenas, and the Division's subpoena application states
12 "[t]his application is made pursuant to A.A.C. Rule R14-3-109." Moreover, the subpoena
13 commands testimony at a Commission hearing, conducted under the procedural rules, not an
14 investigation.

15 In short, the Commission's procedural rules apply to the June 9th subpoena, and they
16 require a subpoena application to state the facts upon which the application is based. The
17 Division enforces this standard against others; it must comply with the same rules. It has failed to
18 do so, and thus the subpoena must be quashed.

19 **IV. Conclusion.**

20 The subpoena to Mr. Sargent should be quashed. The subpoena is untimely, and thus
21 presumptively unreasonable, and even without a presumption, the lateness of the subpoena
22 unreasonably impairs Mr. Sargent's ability to adequately prepare to testify. Moreover, the
23 Division seeks to evade the required witness fees by pointing to the Rules of Civil Procedure – the
24 same rules it claims time and time again do not apply to Commission proceedings. Lastly, the
25 subpoena application is insufficient, under the standard the Division itself articulated on
26

27


⁹ Division Response at page 6, footnote 10.

ROSHKA DeWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

May 10th.

RESPECTFULLY SUBMITTED this 22nd day of June, 2010.

ROSHKA DeWULF & PATTEN, PLC

By 

Paul J. Roshka, Jr.

Jeffrey D. Gardner

Timothy J. Sabo

One Arizona Center

400 East Van Buren Street, Suite 800

Phoenix, Arizona 85004

602-256-6100 (telephone)

602-256-6800 (facsimile)

Attorneys for Respondents

Michael J. Sargent and Peggy L. Sargent

ORIGINAL and thirteen copies of the foregoing
filed this 22nd day of June, 2010 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered
this 22nd day of June, 2010 to:

Marc E. Stern, Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Aaron S. Ludwig, Esq.
Securities Division
Arizona Corporation Commission
1300 West Washington Street, 3rd Floor
Phoenix, Arizona 85007

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 Copy of the foregoing mailed
2 this 22nd day of June, 2010 to:

3 Robert D. Mitchell, Esq.
4 Joshua R. Forest, Esq.
5 Julie M. Beauregard, Esq.
6 Mitchell & Forest, P.C.
7 1850 North Central Avenue, Suite 1715
8 Phoenix, Arizona 85004
9 Attorneys for Respondent Robert Bornholdt

10 Norman C. Keyt, Esq.
11 Keyt Law Offices
12 3001 E. Camelback Road, Suite 130
13 Phoenix, Arizona 85016
14 Attorneys for Respondents
15 Stephen G. and Diane V. Van Campen

16 Mark W. and Lisa A. Bosworth
17 18094 North 100th Street
18 Scottsdale, Arizona 85255
19 Pro Per

20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

Sargent.ACC/pld/Reply in Support of Motion to quash Subpoena to Sargentdoc